THE DECADENCE OF THE SYSTEM OF PRECEDENT.

SOMEWHAT over a year ago, this REVIEW printed a plea of mine for "straight thinking concerning the enforcement of the laws as they exist." [1] The contention there advanced was based upon the hypothesis that the existent *status* of laws was a determinable fact. So far as concerns statutes, the hypothesis is indisputable, although it requires the utmost vigilance on the part of lawyers actively engaged in practice to keep in touch with the changes of the statutory law constantly made by our numerous legislative bodies. But when we consider the field of the unwritten law, the vast mass of matters not covered by statutes, can we regard our hypothesis as established? In a word, have we a system of precedents which enables us to determine from an examination of them what the law on any particular subject (not regulated by statute) ought to be declared by the courts to be, when a dispute of litigants brings the matter there for determination?

The answer to this question is of the greatest importance, both to the lawyer who seeks to advise a client with a reasonable degree of assurance, and to the courts who have to make the final declaration on the dispute. It is manifest that some definite answer ought to be made to the question, in order that we shall come to a clear understanding of the system (or want of it) under which we are working. Nothing can be more deleterious to our legal administration than to purport to be acting on a basis which has no foundation in fact. In law, as in everything else, the most vicious mental process is that which involves dishonesty with ourselves. If our ancient system of precedent has become impracticable, the sooner we frankly admit it and seek another basis, the better it will be. Chaos even is preferable to intellectual dishonesty.

When our system of precedent had its birth, in England, there was no difficulty by way of too great a mass of authorities. Indeed, the opposite difficulty barred the path of progress; there were *no*

[1] 22 HARV. L. REV. 427.

precedents, or, what few there were, could not be found in sufficiently definite form to justify scientifically accurate action on them. The judges' and lawyers' recollections of the cases which came before them for determination or in which they participated, had to be the basis of future action and decision. Naturally, this was a loose method. Recollections differed, or the precise determinant fact was forgotten or perverted. But, still, the system worked. There were few courts and a small bar of men who devoted practically all their time to the trial of causes and the argument of appeals involving a continuous refreshing of their memories on the details and principles of the past authorities. Moreover, the bar was a carefully selected body of men of superior intelligence, with high ideals and a keen sense of their obligation to administer rationally and fairly the system under which they were working.

Then came the more careful and systematic reports of the decisions. It was no longer necessary to depend upon frail human memory and tradition as to what a given authority stood for. Some young lawyer, ambitious to have a set of precedents of his own and not yet in the enjoyment of a practice which consumed his time and energies, sat in court during trials and appeals, and made detailed notes of what took place. These note-books, in an entirely natural course of evolution, were among our first books of reports. A realization of the tremendous assistance of these sporadic reports in the administration of the system based on precedent, inevitably gave birth to the plan of having all the doings of courts of sufficient dignity and standing put down in fairly comprehensive form for future reference. Even this stage of development presented few difficulties in practical operation in England — at least, until comparatively recently. There was but the one general jurisdiction; the courts were not numerous; their utterances not voluminous; opinions were not delivered, or, at all events, not recorded, in matters involving no new or important questions; judges came to the bench, generally speaking, from the best of the bar, and were familiar with the *status* of the authorities.

In time, however, these reports began to get too voluminous to be carried about in the heads of even the scholarly lawyers and judges or to be disclosed in the limited research a busy lawyer or judge was able to make. It was found that some former decision had been overlooked in passing on the subsequent similar state of

facts. Or, perhaps, the forceful personality of some judge had made itself manifest in deliberate revolution against the rule established by the earlier cases. The question then was presented, whether the courts ought to adhere to the later decision, or whether the rule first laid down should be reasserted. Truly, Pandora's box was opened when this state of the authorities was reached! The fertile field of opportunity for well-nigh endless litigation became open to him who would till it. And even to those who had no litigious desires, it became necessary to engage in long and expensive contests in order to secure a final determination on some matters which had to be determined *somehow*. Eventually, the rule to govern the particular subject would be definitively laid down, of course. But the diversification of conditions and the ingenuity of man constantly presented new questions and new phases of old questions, until it has been found quite beyond the power of even the most studious and scholarly *savant* to bear in mind the various decisions on even one branch of the law.

"Confusion worse confounded" has resulted from the complexity of our modern civilization and the facility of inter-communication. It is no longer a question of carrying in an over-burdened memory, or of making a search for, the precedents of *one* jurisdiction, but of almost innumerable courts, for centuries even, in some cases. A lawyer cannot safely remain ignorant of the development of the law in other jurisdictions, for, notwithstanding prior decisions, the novel tendency in the foreign state may produce a change of views in his own state. How manifestly absurd it is for the practicing lawyer even to attempt to keep *en rapport* with the decisions of Great Britain, of the numerous federal courts, and of the other states, while he is laboriously endeavoring to read the opinions of the higher courts of his own state in the few leisure moments he can get from the other demands of his professional life!

Let us narrow the consideration to one jurisdiction and see if we do not find an impossible condition even there. Take New York, for example. In 1895, there was created an Appellate Division of the Supreme Court, which, as to some matters, is an intermediate court of appeals, and, in certain respects, is a court of last resort. This court began its work on January 1, 1896. In these fifteen years which have elapsed since its creation, one hundred and thirty-eight volumes of reports, containing from seven hundred to upwards

of nine hundred pages, have been issued. During this time, the Court of Appeals — the general court of last resort — has issued some fifty volumes of from five hundred to seven hundred pages each. The decisions of the Supreme Court of the United States, and of the Federal Circuit Court of Appeals and Circuit Court for the particular circuit covering his state, have to be followed by every lawyer, under our dual system of government. The Supreme Court has published some fifty-five volumes of, say, seven hundred pages each, during the period we are considering. The *quantum* of decisions of the United States Circuit Court in New York during this period is not readily ascertainable, but it is, without doubt, commensurate with the deliverances of the other courts more specifically considered.

Is it not entirely clear that, with such a mass of current decisions, no one — not even the judges themselves, who have not the details of a practice to interfere with the pursuit — can follow, even superficially, the development of the law in his own state? It seems manifestly so.

There is, moreover, another reason for the decay of our former system of precedent, apart from this breaking down of its own weight. I refer to the tendency of mankind to rebel at the application of an established principle to a particular case where it seems to work a hardship. The tendency is manifest not only amongst laymen: it has found lodgment in the mental operations of courts and lawyers. Sometimes judges consciously stretch the rule of law until it loses shape in order to effect what they think the desirable result in the particular cause. A story which is told of a Judge of one of the stronger eastern courts of last resort, aptly illustrates the effect of this tendency. This Judge was not long since asked his opinion concerning a brief submitted to his court in a cause in which he had not sat. Counsel for appellant said to him: "My brief was forty pages; only ten pages dealt with matters which, under the decisions of your court, were actually open for decision by the court; the other thirty pages were devoted to demonstrating the injustice of the result reached by the courts below. I would like to know, if you feel free to tell me, whether I ought to have submitted the forty-page brief, or whether I should have confined myself to the ten pages of discussion on the questions really open." "Well," said the Judge, "perhaps I can answer that best by telling

you that the first question we take up in the consultation-room is, 'which side ought to win?'"

Any such mental operation or habit of thought is, naturally, inimical to the proper working of a system of precedent. I do not mean to imply that any consideration of "which side ought to win" necessarily interferes with a decision based on prior rules; but initial deliberation on such a question almost inevitably tends toward the destruction of a system of precedent. And, as a matter of fact, matters have gone much further than indicated in the story just quoted. The first inquiry of many courts may be, "which side ought to win"; but the last one is too often: "How can we let that side win, in the face of the authorities and our own decisions?" When that point is reached, what is left of our much-vaunted system of deciding cases in accordance with the rules laid down in prior opinions? Surely it remains as a mere mirage luring us on to our undoing! It allows us to purport to act on a system which has no real existence. It leads inevitably to intellectual dishonesty.

I believe no one can doubt this tendency of courts who has followed the operations of any particular court for any considerable length of time. If one has doubts, let him compare the opinions and decisions of the last ten years with those of the preceding decade. He will find, I am sure, a decreasing discussion of precedents and a constantly increasing reference to the merits or demerits of the particular cause under decision. He will also find affirmances, and even reversals, without opinion, where the decision is not consonant with prior decisions, though apparently equitable and just in the given case. Courts are unquestionably affected by the atmosphere about them, and this is the prevalent mode of thought to-day: "Which side ought to win?" It is little to be wondered at if, with such an atmosphere, and with the tremendous mass of undigested and indigestible authorities confronting them, our courts pay less and less heed to precedents.

Then the lawyers are infected. How can a man help observing and following the tendency of the courts before which he practices? It is inevitable that he must lay less and less stress on what the court has heretofore declared the law to be, and more and more on what he regards as the "equities" of his case, if the courts adopt such a course in rendering their decisions. And we find him doing it, even the more eagerly as it saves him a vast amount of work in

searching out and discussing the large number of authorities. It is always easier to discuss the merits of the case, as they appear in the facts presented, than it is to digest and present to the court the pertinent prior decisions in a scholarly manner.

There does not seem to be any room for doubt that we have well-nigh reached the parting of the ways: either we must frankly discard the purported system of precedent and devise something different, or we must set our faces resolutely toward its restoration to a strong and controlling force. Can we afford to discard it? If we do, there seems but one course open to us — codification. The boast of all the administrators of our common-law system of precedent has always been that it avoided the ossification inevitably incident to the code plan; that it allowed for the give-and-take of changing civilizations and conditions, without the hardships necessitated in particular causes when a statute had to be changed to meet an altered condition; that its underlying principles were big and broad enough to stand any strain or to meet any exigency. Surely the ideal is worth working and fighting for! It is even more so, when viewed in the light of our attempts at codification. Most of the work of that sort has been badly done in this country. Our haste to be done with the particular task generally precludes us from the patient examination of all the prior cases and laws and the exhaustive consideration of all the natural and possible results of the proposed legislation, which any good codification imperatively requires. We see one large need to be filled or one crying evil to be corrected, and the vividness of the vision deprives us of all other hind- or foresight. Moreover, the men best qualified to do such work are rarely obtainable. Our judges are too busy deciding causes, our lawyers too much occupied in furnishing the materials for such decisions, and our teachers of law too much engaged in making embryonic lawyers and judges. The work is thus left largely to those least fitted for the work, namely, those who have some particular "axe to grind," or the legislators, who have not the requisite ability or scholarship.

We find, too, not only this difficulty of codification, in practical operation, but it is also to be borne in mind that we are a people whose temperament and habits of thought are radically opposed to the hard-and-fast rule. What I have just noted as one of the difficulties of the rigid administration of our system of precedent,

applies with greater force to any code system. Consider for a moment the rapidity with which we change a statute as soon as we get it on our statute book; if it lasts over two sessions of the legislature without material modification, it is exceptional. Consider, too, our disregard as by common consent of numerous statutes we enact into law, such as excise and police legislation. The rule is still laid down in the penal or criminal code, but we have changed our minds or we do not like the rule when we try it, so we calmly disregard it. And in all this there is much reason in a country like ours where conditions may change over-night. We are predisposed to the system with the most elasticity in it because it fits our environment. Our greatest censure of the system of precedent even is that it is not elastic enough.

It is the best system, however, that man has yet devised — at least for us and our conditions. We *must* have some rule of conduct, and any rule involves a certain degree of rigidity. Let us earnestly set to reëstablishing it, rather than consciously or unconsciously whittling it down.

There is no doubt that an intelligent and united effort now can overcome even the difficulties we have been discussing. We can escape the crushing accumulation of authorities and opinions by referring to the broad principle which any especial line of cases lays down rather than to the particular cases themselves with their endless variation. Let us cease to be "case lawyers," in the sense of seeking a precedent with like facts. It is the rarest chance to find a case which is on all fours with the one up for decision. It is an everyday experience to find numerous authorities which enunciate clearly the principles that ought to determine the case at bar. When we have found that principle, the cases are not important. Our system of precedent ought to be one of principles — not cases. Many of these principles are so clearly established that authorities in support of them are superfluous. If we find one or more of our "hard cases" which have departed from the principle, let us avow the error which such cases involve, and frankly cast them overboard, instead of seeking to distinguish them by ingenious sophistries. When the principle is clearly established and the cause to be decided manifestly governed by it, let us refrain from augmenting the mass of legal literature by further learned opinions. The pride of particular judges and the feelings of individual lawyers may suffer in this

process, but nothing is accomplished without some sacrifice. Above all, let us all regard ourselves as the conservators of a system which has been the glory of our race these many centuries, rather than agents for its destruction in order to gain some advantage for the client of the moment. Let us not lose sight of the big, ultimate object in the detail just next us. Surely the duty to the client ought not to carry the lawyer to the point of seeking to induce the court to depart from an old and firmly-established principle of our common law by means of ingenious shifts and devices. The lawyer is too prone to forget, in his zeal for the client, that he, as well as the judge, is a part of the machine for perpetuating and building up the system of precedent, and that it is his duty, as well as that of the judge, to do nothing to destroy or mar the integrity and symmetry of that structure.

When we reflect on the difficulties which seem inevitable if we abandon or abuse this system of precedent that has been handed down to us, is it too much to expect or hope that the profession will make the requisite effort to put the system on its feet again, even against the obstacles we know we face?

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